STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CLEMENCE JOHN POLZIN,

Plaintiff,

Case No. 2005-5027-NF

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.
_____/

OPINION AND ORDER

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9), (C)(10) and MCL 500.3142.

According to plaintiff's complaint filed December 15, 2005, plaintiff was involved in an auto accident on December 17, 2000 in which he alleges he sustained certain bodily injuries. Plaintiff alleges he has incurred medical expenses and received medical services, which he believes that under his policy with said defendant insurance company, he should be compensated. Plaintiff alleges that defendant has refused to pay for certain benefits of which he believes he is entitled, as of August 24, 2005, thus triggering this lawsuit. By stipulated order issued January 24, 2006, plaintiff deleted paragraphs 9, 13 and 17 of his complaint.

*Standard of Review*

Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim. *Village of Dimondale v Grable,* 240 Mich App 553, 564; 618 NW2d 23 (2000). A motion under this subsection tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are "so clearly untenable as a

matter of law that no factual development could possibly deny plaintiff's right to recovery" then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties' pleadings in deciding a motion under this subrule. MCR 2.116(G)(5). "Pleadings" as defined in MCR 2.110(A) include only a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. *Huntington Woods v Ajax Paving Industries Inc (On Rehearing),* 179 Mich App 600, 601; 446 NW2d 331 (1989). A motion for summary disposition is not a responsive pleading under MCR 2.110(A). *Id.*

A motion for summary disposition under MCR 2.116(C)910) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); *Klein v Kik,* 264 Mich App 682, 685; 692 NW2d 854 (2005). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, and the disputed factual issue must be material to the dispositive legal claims. *State Farm v Johnson,* 187 Mich App 264, 267; 466 NW2d 287 (1990). The Court must consider all pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Corley, supra* at 278.

*Applicable Law*

Plaintiff alleges defendant is in violation of MCL 500.3142, which provides:

> (1) Personal protection insurance benefits are payable as loss accrues.
> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of

the remainder of the claim that is supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(3) An overdue payment bears simple interest at the rate of 12% per annum.

MCL 500.3107 provides for personal protection insurance benefits including reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. MCL 500.3157 provides that a person or institution providing rehabilitative, occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.

The Court in *Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365; 670 NW2d 569 (2003) ruled that it is for the trier of fact to determine whether a medical charge, albeit "customary" is also reasonable, and affirmed at the Supreme Court level; see 472 Mich 91, 95; 693 NW2d 358 (2005).

Under this statutory scheme, an insurer is not liable for any medical expense that is not both reasonable and necessary. *Hofmann v Auto Club Ins Ass'n,* 211 Mich App 55, 93-94; 535 NW2d 529 (1995), quoting *Nasser v Auto Club Ins Ass'n,* 435 Mich 33, 49-50; 457 NW2d 637 (1990). The reasonableness of the charge is an explicit and necessary element of a claimant's recovery against an insurer, and, accordingly, the burden of proof on this issue lies with the plaintiff. *Id.* "Where a plaintiff is unable to show that a particular, reasonable expense has been incurred for a reasonably necessary product and service, there can be no finding of a breach of

the insurer's duty to pay that expense, and thus no finding of liability with regard to that expense." *Nasser, supra* at 50.

*Discussion*

Plaintiff submits that defendant stopped paying plaintiff attendant care benefits on August 24, 2005. Plaintiff further submits that his treating physician, Dr. Todd Rozen, at Michigan Head Pain and Neurological Institute indicates that plaintiff needs continuing attendant care on an ongoing basis and has forwarded numerous attendant care slips to defendant company.

In response, defendant admits that Dr. Rozen has in the past written prescriptions for attendant care but denies that Dr. Rozen has provided a current prescription for attendant care as the most recent prescription expired more than two months ago [as of May 17, 2006]. Moreover, in 2003, plaintiff filed suit against defendant company which was ultimately settled and agreed that defendant would pay attendant care benefits through August 23, 2005. Further, defendant maintains that records indicate that plaintiff's injuries/conditions had improved markedly and there was no longer a reasonable basis for defendant to continue paying attendant care benefits.

The documentary evidence submitted by plaintiff dated December 19, 2005, from his primary physician indicates that due to his chronic daily headache and cognitive dysfunction, plaintiff continues to need attendant care for such things as personal hygiene care, and taking his prescribed medications properly. The correspondence indicates that plaintiff needs full-time care of 12 hours per day. Correspondence from this physician dated December 7, 2005 stated, "There is not doubt that this gentleman does need attendant care. For some reason, this was discontinued. We are in full support of it."

Plaintiff's deposition demonstrates that although he sounds competent in certain areas of normal, daily activities, at other times, he cannot function in a normal fashion. As an example, he will not use a stove for fear of forgetting to turn it off, has forgotten he has lit a cigarette and left it burning somewhere; because he ingests so many different types of prescriptive medicines, he cannot remember when to take them, or if he has taken them, and does not trust that even if they are properly organized he would not lose them, or he would be proficient in understanding the routine without someone to physically give him the medications he needs when he is supposed to take them. Although he has attained a driver's license, and does drive, he is not comfortable driving because he often gets lost. His significant-other of 14 years works during the day, so she is not home to care for him. Plaintiff lives on a farm and has animals, but because of his chronic shoulder, back and neck pain, he cannot lift feed bags to feed the animals, so he has his brother, or another person, feed them. Plaintiff would like to get some vocational training because he wants to work, but because of his disability, has not been able to work.

One of plaintiff's treating psychologists stated "he does have some significant deficits and they're of our concern. But it was unclear that he needs constant attendant care as though it were supervision, if you will, someone with him constantly at all times for all purposes. But we do believe that there are some deficits that warrant close monitoring." Further, the deposed stated, "I believe he needs to be tested to see the extent to which he is capable of [making appropriate decisions, driving, controlling his impulsive decision making]." The deposed also stated he was aware of plaintiff's marijuana use and had encouraged plaintiff to discontinue it in view of the fact that he does not know what kind of interaction the marijuana would have on his nervous system receptors while he is also consuming several other drugs.

Plaintiff is currently scheduled for IMEs on May 25, 2006, June 21, 2006 and June 27, 2006. Defendant states that despite a Record Copy Services subpoena, defendant has been unable to obtain the complete records from the facility at which plaintiff sought considerable treatment through December, 2005.

The Court is convinced that there is no basis to grant plaintiff's request for summary disposition under MCR 2.116(C)(9), as defendant has clearly stated its defenses to plaintiff's complaint in its affirmative defenses segment. Further, the Courts finds that genuine issues of material fact remain, particularly in light of the fact that there are unfulfilled requests for information that when once produced, will provide support in one direction or another. As it now stands, plaintiff has not presented enough documentary evidence to sustain his claim that he requires continuing attendant care on an ongoing basis, and that as a matter of fact, the benefits of which he seeks are reasonable and necessary.

For the above-stated reasons, plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10) is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last pending issues, and does not close the case.

IT IS SO ORDERED.

MARY A. CHRZANOWSKI

Honorable Mary A. Chrzanowski P39944
Circuit Court Judge

Dated: JUN 09 2006

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